

Review of 2002 SME banking undertakings

Provisional decision

17 May 2016

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1. Summary

- 1.1 The Competition and Markets Authority (CMA) has a statutory duty to keep under review undertakings made under the Fair Trading Act 1973 (FTA) and under the Enterprise Act 2002 (EA02).¹ From time to time, the CMA shall consider whether, by reason of any change of circumstances, an undertaking is no longer appropriate and needs to be varied, superseded or released.²
- 1.2 On 6 November 2014, we decided that the 2002 SME banking undertakings (the undertakings) should be reviewed, and that this review would be undertaken by a CMA Group comprising the CMA panel members also conducting the retail banking market investigation.³
- 1.3 We have provisionally decided that, with the exception of the bundling undertakings, which prohibit the banks⁴ from compelling a customer to open or maintain a BCA alongside their loan or deposit account, market and regulatory developments since the undertakings were given, and the retail banking market investigation's proposed remedies package, represent changes of circumstances such that the undertakings can be released.⁵
- 1.4 We have provisionally decided to retain the bundling undertakings. Both the CMA's initial assessment of the undertakings and the provisional findings of our retail banking market investigation suggest that there remain strong product linkages between business current accounts (BCAs) and lending to small and medium enterprises (SME lending), and that this particularly favours the longer-established banks. As such, we have not identified a relevant change of circumstances for the bundling undertakings and these undertakings, which mitigate the adverse effects of these linkages, should be retained.
- 1.5 Our provisional decision is summarised in Table 1 below.

¹ See [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA11\)](#), paragraph 2.2.

² See FTA, section 88(4) and EA02, section 162(2).

³ [Retail banking market investigation case page](#).

⁴ The CC accepted undertakings from nine banks. These were: AIB Group (UK) plc (known as First Trust Bank); Bank of Ireland; Barclays Bank plc; Clydesdale Bank PLC; HBOS plc (now part of Lloyds Banking Group); HSBC Bank plc; Lloyds TSB Bank plc (now part of Lloyds Banking Group); Northern Bank Limited (now known as Danske Bank); and The Royal Bank of Scotland Group plc (which also includes Ulster Bank Ltd in Northern Ireland). The 9 banks became 8 following the acquisition of HBOS plc by Lloyds TSB plc in 2009.

⁵ Our provisional decision is based on the assumption that our proposed remedies package is adopted. We will revisit our assessment of the effect of the proposed remedies on these undertakings should this not be the case.

Table 1: Summary of provisional decision

Undertakings	Description	Provisional decision	Rationale
Transparency (Clauses 21 to 24 of the behavioural undertakings and Clause 11 of the transitional undertakings)	Information on charges and interest rates	Release	The retail banking market investigation's proposed remedies package improves upon and renders the transparency undertakings unnecessary, as they combine information provision with tools to enhance price and service comparison.
Switching (Clauses 6 to 14 of the behavioural undertakings and Clauses 6 to 19 of the switching undertakings)	Establishment of a switching process	Release	<p>The introduction of the Current Account Switch Service (CASS) in 2013 improves upon and renders the switching undertakings unnecessary.</p> <p>It is not necessary to retain the switching undertakings for those 1% of SMEs that are not eligible for the full switching service under CASS.</p>
Portable credit history (Clauses 15 and 16 of the behavioural undertakings)	Provision of up-to-date credit history to SME and any other bank nominated by SME	Release	Regulatory developments in relation to the sharing of SME credit data (eg the Small Business, Enterprise and Employment Act 2015 (SBEEA)), and the retail banking market investigation's proposed remedies package, which includes measures to enable SMEs to search and switch products and providers, improve upon and renders the portable credit history undertaking unnecessary.

Undertakings	Description	Provisional decision	Rationale
Bundling (Clauses 17 to 20 of the behavioural undertakings)	Prohibition from compelling a customer to open or maintain a BCA as a condition for granting, maintaining or servicing a loan or deposit account	Retain	There remain strong product linkages between BCAs and SME lending, and together with the information asymmetries between an SME's BCA provider and other lending providers, this favours longer-established banks.

2. Introduction

- 2.1 The CMA has a statutory duty to keep under review undertakings made under the FTA and under the EA02. From time to time, the CMA must consider whether, by reason of any change of circumstances an undertaking is no longer appropriate and needs to be varied, superseded or released.⁶
- 2.2 As part of its consideration of whether to conduct a review, the CMA initially assesses whether there is a realistic prospect of the review finding that there has been a change of circumstances since the undertakings were first given.⁷
- 2.3 Alongside the [market study of 2013/14 into banking services to SMEs \(2013/14 market study\)](#), the CMA on its own initiative undertook an initial assessment of the undertakings. The CMA's findings were set out in Chapter 11 of the market study published on 18 July 2014.⁸ Drawing on the analysis in the market study, the CMA considered that there was a realistic prospect of finding that there had been a change of circumstances since the undertakings were given, such as to warrant a review into whether they remained appropriate in their current form, or at all.⁹
- 2.4 The CMA found that there was a realistic prospect of finding that there had been such a change of circumstances given the implementation of CASS in 2013. The CMA considered the implementation of CASS in 2013 to have made an important improvement in the switching process and considered there to be a realistic prospect that, for those SMEs covered by CASS, it substantially superseded the obligations regarding the switching process included in the undertakings.
- 2.5 On 18 July 2014, we invited comments both on the initial assessment and on whether a review should be an administrative priority for the CMA, by reference to its prioritisation principles. Having considered the responses,¹⁰ and taking account of our prioritisation principles,¹¹ we decided on 6 November 2014 that the undertakings should be reviewed, and that this

⁶ See [CMA11](#), paragraph 2.2.

⁷ See [CMA11](#), paragraph 3.10.

⁸ The CMA considered that there were four main elements of the undertakings that were particularly relevant to the assessment: transparency undertakings (clauses 21 to 24 of the [behavioural undertakings](#) and clauses 11 to 14 of the [transitional undertakings](#)); switching undertakings (as detailed in the entire [switching undertakings](#) and clauses 5 to 13 of the [behavioural undertakings](#)); bundling undertakings (clauses 17 to 20 of the [behavioural undertakings](#)); and facilitating the provision of portable credit histories to SMEs (clauses 15 and 16 of the [behavioural undertakings](#)).

⁹ See [2013/14 market study](#), pp16 & 17.

¹⁰ The responses to the consultation are published on the CMA's [review of 2002 SME banking undertakings](#) consultation page.

¹¹ See the [CMA Prioritisation Principles](#).

review would be undertaken by a CMA Group comprising the same CMA panel members conducting the retail banking market investigation.

3. Background

- 3.1 The banks provided the undertakings in 2002 and 2003 with a view to remedying concerns outlined in the [Competition Commission's \(CC\) 2002 report into SME banking](#).¹²
- 3.2 The undertakings accepted by the CC, comprised a number of requirements on banks covering transparency, switching, bundling and portable credit histories. The undertakings also required the banks to investigate the feasibility of sharing branch facilities where a bank did not have a local branch presence.

Transparency undertakings

- 3.3 The transparency undertakings are set out in Clauses 21 to 24 of the behavioural undertakings and Clause 11 of the transitional undertakings.
- 3.4 The banks must compile and provide a range of price information on their services to SME customers:
- (a) Standard tariff charges payable by SMEs for the money transmission services listed in Schedule 2 of the undertakings.
 - (b) Standard rates of interest paid by the banks on BCAs held by SMEs.
 - (c) Standard rates of interest paid by the banks on short-term deposit accounts held by SMEs.
- 3.5 The banks must notify SMEs in relation to any overdraft charges and interest they have incurred in the statement for that account (or in a separate notice that accompanies the statements) or in a pre-notification notice.¹³
- 3.6 The banks must notify the CMA and publish notifications of:
- (a) increases in the tariff-based charges and standing charges listed in the schedule attached to the transitional undertakings; and

¹² The undertakings were reviewed by the CC in 2007 and the transitional undertakings were released, with the exception of undertaking 11, which required four banks to notify the OFT (and subsequently the CMA after 1 April 2014), and to publish, all increases in charges and all new charges.

¹³ A pre-notification notice is defined as a notice of interest and/or charges incurred during a charging period which are to be deducted from an SME's BCA. The notice is given at least 14 days before any such deductions are made.

- (b) new charges for any new or listed money transmission services and standing charge.

Switching undertakings

- 3.7 The switching undertakings are set out in Clauses 6 to 14 of the behavioural undertakings and Clauses 6 to 19 of the switching undertakings.
- 3.8 The banks were required to agree upon the establishment of a switching process, which included:
 - (a) the transfer of direct debits from one bank to another;
 - (b) the resolution of any delays in any such transfers;
 - (c) the release from the old bank and transfer to the new bank of any security given by the SME;
 - (d) a reasonable and proportionate timescale for completing a switch;
 - (e) the payment of compensation to the SME when a switch is not completed within the agreed timescale; and
 - (f) the publication of performance objectives reporting the banks' ability to meet the agreed timescales.
- 3.9 For each stage of the switching process, a schedule attached to the switching undertakings outlined targets for when each stage should be completed. The SME could apply for a payment from the old bank if it failed to meet any of the targets set out in this schedule.
- 3.10 In addition, the banks are prohibited from charging SMEs in relation to the switching of an account, including the levying of charges in relation to the early termination of a business loan at the same time as the switch.

Portable credit history

- 3.11 The portable credit history undertaking is set out in Clauses 15 and 16 of the behavioural undertakings.
- 3.12 The banks must provide, upon request and free of charge, an up-to-date credit history to an SME and any other bank as nominated by the SME, such that the other bank has sufficient information in relation to the SME to make an informed lending decision. The banks are not obliged to provide more than two such credit histories for no charge over a period of 12 months.

3.13 The credit history must outline the following information:

- (a) Details of any finance agreements in place, including any overdraft facilities.
- (b) A monthly breakdown of the SME's transactional activity over the last 12 months, covering the account balance, credit turnover and overdraft limit.
- (c) Confirmation of whether (and how many times) any payments have been returned unpaid due to a lack of funds in the SME's current account.

Bundling undertakings

3.14 The bundling undertakings are set out in Clauses 17 to 20 of the behavioural undertakings.

3.15 The banks are prohibited from compelling a customer to open or maintain a BCA as a condition for granting, maintaining or servicing a loan or deposit account.

3.16 The banks can, however, offer incentives (eg lower charges or interest rates) to SMEs to open a BCA alongside their loan or deposit account, and they can offer integrated products (provided that the integrated products are also offered separately).¹⁴

Branch sharing

3.17 The branch-sharing undertaking is set out in Clauses 25 and 26 of the behavioural undertakings.

3.18 The banks were required to conduct an investigation into the feasibility, costs and associated benefits of participation in a UK-wide branch-sharing scheme with other banks without a local branch presence.

4. Provisional decision

4.1 We have provisionally decided that, with the exception of the bundling undertakings, market and regulatory developments since the undertakings were given, and the likely effect of the retail banking market investigation's proposed remedies package, represent changes of circumstances such that the undertakings can be released.

¹⁴ The bundling undertakings prohibit the tying of a BCA and a loan or deposit account, but does not prohibit the provision of integrated products (ie the sale of several products as one combined product).

- 4.2 We have provisionally decided to retain the bundling undertakings. We have not identified a relevant change of circumstances for the bundling undertakings. Both the CMA's initial assessment of the undertakings and the provisional findings of our retail banking market investigation suggest that there remain strong product linkages between BCAs and SME lending, and that this particularly favours the longer-established banks.

Transparency undertakings

- 4.3 We have provisionally decided to release the transparency undertakings.
- 4.4 The CMA's initial assessment of these undertakings found that although they have played a role in improving the transparency of prices, concerns remain about the transparency and comparability of prices.¹⁵
- 4.5 Our retail banking market investigation provisionally found that competition in the BCA market was not fully effective, due to weak customer engagement and/or barriers to accessing and assessing information, which prevented SMEs from identifying the best offers in the market and acting on these to switch their BCA.¹⁶
- 4.6 We provisionally found that while price information was available, it was difficult for SMEs to compare charges across banks, because of the complex tariff structures and multiplicity of charges for BCAs; the variability in usage; and the lack of effective price comparison tools.¹⁷
- 4.7 We have proposed a number of remedies intended to address our provisional findings in relation to the transparency and comparability of BCA pricing. These remedies, which combine information provision with tools to enhance price and service comparison, will improve upon and render the current undertakings unnecessary.
- 4.8 We have provisionally decided to:
- (a) prompt SMEs to consider making changes to their banking arrangements at times when they may be more receptive to such messages. This includes providing them with an annual summary of the costs and benefits of their BCA;¹⁸

¹⁵ See [2013/14 market study](#), p180.

¹⁶ See [Summary of retail banking market investigation provisional findings report](#), p22.

¹⁷ *ibid*, p24.

¹⁸ See Section 3 of our provisional decision on remedies.

- (b) facilitate price comparison between providers by making customer transaction data and banks' pricing information more easily available and useable;¹⁹
- (c) facilitate the establishment of a comparison website for SMEs;²⁰ and
- (d) enable customers and SMEs to make comparisons between current account providers on the basis of their service quality.²¹

Switching undertakings

- 4.9 We have provisionally decided to release the switching undertakings, as CASS improves upon and renders the switching undertakings unnecessary.
- 4.10 We concur with the CMA's initial assessment of the undertakings, in particular that:
- (a) There was a realistic prospect that CASS substantially supersedes the switching undertakings with respect to the timing of the switching process and the measurement of performance for eligible SMEs.²²
 - (b) CASS has certain advantages over the switching undertakings:
 - (i) The guarantee of a switch within seven working days provided greater clarity regarding the overall timescales involved in switching BCAs than the more complex timetables included in the switching undertakings.
 - (ii) It included a 13-month redirection period for payments into the SME's old account and provided additional guarantees for switchers that they would receive all relevant payments without the risk of them being diverted to an old account.²³

¹⁹ See Section 3 of our provisional decision on remedies.

²⁰ See Section 6 of our provisional decision on remedies.

²¹ See Section 3 of our provisional decision on remedies.

²² See [2013/14 market study](#), p180.

²³ In March 2015, the redirection period was extended to 36 months. We are proposing to seek an undertaking from Bacs to the effect that beyond the current 36-month redirection period, after a customer has switched account, CASS provides perpetual redirection for customers as long as they have had a redirected payment within the preceding 13 months. See Section 4 of our provisional decision on remedies.

- (iii) It had a broader coverage, covering 17 financial institutions representing 33 bank and building society brands.²⁴ In contrast, eight banks are subject to the switching undertakings.
 - (c) The maintenance of both CASS and the framework included in the switching undertakings was likely to be undesirable for banks and confuse SMEs. Moreover, we are proposing measures to improve the operation of CASS.²⁵
- 4.11 In its initial assessment, the CMA also found that there was not a realistic prospect of a change of circumstances for those SMEs ineligible for CASS, and those aspects of the undertakings relating to the imposition of switching charges or wider issues with respect to switching.²⁶
- 4.12 We note that in contrast to the switching undertakings, CASS does not compel the release and transfer of security given by the SME upon completion of the switch, and it does not prohibit the charging of fees in relation to the early termination of a loan in line with the switch. However, we have seen no evidence to suggest that either of these provisions remain necessary.
- 4.13 Further, CASS does not require the payment of compensation to the SME when a switch is not completed within the agreed timescale. However, the CASS guarantee provides an equivalent level of assurance to SMEs that the switch will be completed securely and within the agreed timescales. It also refunds the customer any interest (paid or lost) and charges made on either the old or new account if anything goes wrong with the switch.
- 4.14 For those SMEs that are ineligible for the full switching service provided under CASS, they are entitled to use the partial switching service.²⁷ As submitted by Danske Bank, the partial switching service does not meet the requirements of the switching undertakings, because the service:
- (a) is not covered by the seven working day switch guarantee;²⁸

²⁴ Over 40 UK banks and building societies are currently signed-up to CASS and we think that this represents sufficient coverage of the BCA market.

²⁵ See Section 4 of our provisional decision on remedies.

²⁶ See [2013/14 market study](#), pp180 & 181.

²⁷ At the time of the initial assessment, CASS covered those SMEs with an annual turnover that did not exceed €2 million (or sterling equivalent) and employed fewer than 10 people (referred to as 'microbusinesses'). In March 2015, the eligibility criteria were extended to include SMEs with a turnover of up to £6.5 million. This covers approximately 99% of SMEs in the UK.

²⁸ Bacs told us that larger SMEs typically had individual banking requirements that made a switch within the seven working days guaranteed by CASS (under the full switching service) unlikely to work in a safe and controlled manner (see [Bacs response to the retail banking market investigation updated issues statement](#), p4).

- (b) does not presently support a balance transfer or funding request; and
- (c) does not include an instruction from the customer to transfer the residual balance in their account, nor did it facilitate the funding by the new bank of a debit balance at the old bank.²⁹

4.15 We do not think it is necessary to retain the switching undertakings for those 1% of SMEs that are not eligible for the full switching service under CASS. We concur with the view put forward by HSBC, among others, that there was currently a risk of conflict and confusion between the obligations under CASS and the undertakings, not to mention the cost in terms of time and resources required to maintain two overlapping systems.³⁰

Portable credit history

4.16 We have provisionally decided to release the undertakings requiring the banks to provide a portable credit history to SMEs for the following reasons:

- (a) The CMA's initial assessment of the undertakings found that:
 - (i) There had been very few requests for portable credit histories. For example, one bank reported that it had received only 20 such requests since the undertakings had been given.
 - (ii) The government's proposals to mandate the sharing of credit information was, subject to its implementation, highly likely to create a realistic prospect of there being a change of circumstances.³¹
- (b) A number of our proposed remedies intended to increase SME engagement with the SME lending market by encouraging greater price comparison (see paragraph 4.7), improve upon and render the portable credit history undertaking unnecessary.
- (c) The Small Business, Enterprise and Employment Act 2015 (SBEEA)³² includes provisions designed to give SMEs easier access to finance. For example, it provides for HM Treasury to make regulations to require banks in certain circumstances to:

²⁹ See [Danske Bank response to the retail banking market investigation updated issues statement](#), paragraph 6.2.

³⁰ See [HSBC response to provisional decision to make a market investigation reference in relation to PCAs and SME banking](#), paragraph 61.

³¹ See [2013/14 market study](#), p182.

³² The SBEEA received royal assent on 26 March 2015 and comes into force at staggered periods over 2015 and beyond.

- (i) provide information on their SME customers to credit reference agencies;³³ and
- (ii) following the rejection of a business loan or other credit application, to pass on information about that business to designated finance platforms.³⁴

Bundling undertakings

4.17 We have provisionally decided to retain the bundling undertakings.

4.18 The CMA's initial assessment of the undertakings found that:

- (a) There remained close linkages between BCAs, loans and deposit accounts, and BCAs continued to act as a 'gateway' for those loan and deposit accounts. Therefore, there was not a realistic prospect of a change of circumstances which indicated that these undertakings could be varied, superseded or released.³⁵
- (b) There were specific concerns with compliance with the undertakings. For example, the results of the first report on compliance with the undertakings found that it was breached by Allied Irish Bank (trading as First Trust) (11 breaches) and HSBC (four breaches) in relation to the bundling of BCAs and loans, and that there were low levels of awareness of the undertakings among Barclays and RBS staff.³⁶

4.19 We have not identified, and parties have not submitted to us, a relevant change of circumstances in relation to the bundling undertakings. The provisional findings of our retail banking market investigation confirmed that there are strong product linkages between BCAs and SME lending, and together with the information asymmetries between an SME's BCA provider and other lending providers, this favoured longer-established banks.³⁷ As such, these undertakings, which mitigate the adverse effects of these linkages, should be retained.

4.20 However, we have provisionally decided not to extend the undertakings to all providers of SME banking services. The longer-established banks, who are subject to the terms of the bundling undertakings, represent a very large proportion of the market for the provision of BCAs in both GB and NI, and

³³ See Regulation 3 of the Small and Medium Sized Business (Credit Information) Regulations 2015/1945

³⁴ See Regulation 3 of the Small and Medium Sized Business (Finance Platforms) Regulations 2015/1946

³⁵ See [2013/14 market study](#), pp181 & 182.

³⁶ See [Report on compliance](#), pp4 & 5.

³⁷ See [Summary of retail banking market investigation provisional findings report](#), p28.

would be better placed to compel a customer to open or maintain a BCA as a condition for granting a loan or deposit account if the undertakings were not in place.

Branch sharing

- 4.21 We have provisionally decided to release the undertakings requiring the banks to investigate the feasibility of sharing branch facilities, as the banks have now fulfilled their obligations under the terms of the relevant undertakings.
- 4.22 A study commissioned by the OFT in 2002 in response to the banks' initial investigation concluded that the compulsory sharing of facilities was not necessary or proportionate and would not facilitate new entry, and instead, inter-bank agency agreements negotiated between banks were more effective.

Other provisions

- 4.23 Given that the release of clauses 6 to 19 of the switching undertakings would represent the entirety of the operative provisions, we have also provisionally decided to release the entirety of the switching undertakings, including:
- (a) clauses 1 to 5 which set out the interpretations, definitions and scope of the undertakings;
 - (b) clauses 20 to 22, which cover compliance with the undertakings; and
 - (c) Schedule 1, which sets out the switching targets.
- 4.24 Similarly, given that the release of clause 11 of the transitional undertakings would represent the entirety of the operative provisions, we have also provisionally decided to release the entirety of the transitional undertakings, including:
- (a) clauses 1 to 5 which set out the interpretations, definitions and scope of the undertakings;
 - (b) clauses 12 and 13, which cover compliance with the undertakings;
 - (c) clause 14, which ensured the undertakings applied to both National Westminster Bank plc and The Royal Bank of Scotland plc; and
 - (d) the Schedule on money transmission services.